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No. 392.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

UNITED STATES OF AMERICA,
Petitioner,

v.

GEORGE E. SHIMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for Respondent

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UNITED STATES OF AMERICA,
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GEORGE E. SHIMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED.

1. When Congress enacted Title III of the Servicemen's Readjustment Act of 1944, as amended, 38 U. S. C. (1952 ed.) 694-694n, and expressly provided in Section 506 thereof, that upon default and payment of the guaranty to the holder, the Administrator "shall be subrogated to the rights of the holder . . . to the extent of the amount paid", did not Congress thereby manifest an intention to bar the Administrator from recourse against the veteran after payment of the guaranty, except to the extent that the Administrator succeeded to such rights as subrogee?

2. Where a State Deficiency Judgment Act is passed to protect mortgagors and guarantors, and the holder of a mortgage guaranteed under Title III of the Servicemen's Readjustment Act fails to comply with the provisions of the State Act, the effect of which is to extinguish the debt and release the veteran-mortgagor and the Veterans' Administration as guarantor from further liability thereunder, does an enforceable right of indemnity arise in favor of the Administrator solely by virtue of voluntary payment of the guaranty to such holder?

STATUTES AND REGULATIONS INVOLVED.

Augmenting the statutes and regulations in Appendices A, B and C of the Brief of the United States, there is set forth in Appendix A of this Brief, additional regulations of the Veterans' Administration (*infra*, pp. 19, 20), and in Appendix B, an additional section of the Pennsylvania Deficiency Judgment Act (*infra*, p. 21).

STATEMENT.

This case arises from an action brought by the United States against the respondent, a veteran, to recover the amount paid to the holder of a Pennsylvania mortgage upon default by the respondent in the payment of a home loan mortgage guaranteed by the Veterans' Administration under Title III of the Servicemen's Readjustment Act of 1944, as amended, (hereinafter the Act) (Appendix A, pp. 61-64 of the Government's Brief).

The Government sought to recover from the respondent on two counts: first, as subrogee to the rights of the mortgagee-holder, and second, under an asserted independent contract of indemnity with the respondent (R. 3-5). The respondent defended on the ground that the mortgagee-holder had failed to comply with the provisions of the Pennsylvania Deficiency Judgment Act of July 16, 1941, 12 Pa. Stats. (Purdon), Sec. 2621.1 *et seq.* (Appendix C, pp. 75, 76 of Government's Brief) in that the mortgagee had failed to file a petition for deficiency within six months of the date of the judicial sale (R. 6, 7). The District Court rejected both bases of recovery and granted respondent's

Motion for Summary Judgment under Rule 56(b) (R. 8-12).

The United States appealed to the Court of Appeals for the Third Circuit from the ruling of the District Court against its claim for indemnity only. The Government did not appeal from the ruling by the District Court against its claim as subrogee to the rights of the mortgagee (R. 20, footnote 2).

The Court of Appeals, in an opinion by Circuit Judge Staley, concurred in by Chief Judge Biggs and Circuit Judge Hastie, affirmed the judgment of the District Court (R. 18-26), holding that the failure of the mortgagee to comply with the Pennsylvania Deficiency Judgment Act within the six-month period therein provided resulted in its claim against the veteran being fully satisfied by the security obtained at the judicial sale, and that the Veterans Administration as guarantor was thereby released.

Briefly, the facts as stipulated to by the parties (R. 13-16) disclose that on January 12, 1948, the respondent obtained a loan in the amount of $13,000 from the Excelsior Saving Fund and Loan Association (mortgagee-holder) to purchase a home in Pennsylvania. The Veterans' Administration, on February 11, 1948, approved an application for a loan guaranty made by the respondent, an eligible veteran under Title III of the Servicemen's Readjustment Act of 1944, as amended. The Administrator caused to be issued a loan certificate guaranteeing the loan to the extent of $4,000.00 (R. 13, 14).

On May 12, 1948, the defendant defaulted in payment on the mortgage and on June 29, 1949, the mortgage was duly foreclosed at a sheriff's sale, the property being purchased by the mortgagee for $250.00. Immediately thereafter, on July 8, 1949, the mortgagee filed a claim for payment of its loan guaranty with the Administrator of the Veterans' Administration, and on October 7, 1949, the Administrator

made payment to the mortgagee in the sum of $4,000.00. Within less than three months of the date of the judicial sale, the mortgagee resold the property to third parties for $10,500.00 (R. 14).

At no time did the mortgagee comply with the provisions of the Deficiency Judgment Act of Pennsylvania, requiring that a petition be filed within six months of the sale (R. 14); to wit, no later than December 29, 1949.

ARGUMENT

I.

THE APPLICABLE PROVISIONS OF TITLE III OF THE ACT DID NOT CREATE AN INDEPENDENT RIGHT OF INDEMNITY BETWEEN THE UNITED STATES AND THE RESPONDENT SINCE THE ACT EXPRESSLY PROVIDED THAT THE ADMINISTRATOR SHALL BE SUBROGATED TO THE RIGHTS OF THE HOLDER TO THE EXTENT OF THE PAYMENT ON THE LOAN GUARANTY.

A. *The Government concedes that the defense raised by the Respondent in this case under State Law is valid against the Administrator as Subrogee.*

Section 506 of the Act, which prescribes the procedure to be followed upon default in the payment of any guaranteed loan, provides in pertinent part as follows:

> "In the event of default in the payment of any loan guaranteed under this title, the holder of the obligation shall notify the Administrator who shall thereupon pay

> to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty: *Provided . . . further*, That (1) nothing herein shall be construed to preclude any forbearance for the benefit of the veteran . . ."

The Government, in the First Count of its Complaint (R. 3) and in its Brief (pp. 23, 50) recognizes that under Section 506 "the V. A. is expressly subrogated to the bank's rights to the extent of the guaranty" (p. 23).

Section 504 of the Act authorizes the Administrator to issue rules and regulations "not inconsistent with this title", and the Administrator issued regulations governing the procedure in matters of subrogation, 38 C.F.R. (1949 ed.) 36.4323(a)(b)(c)(d).[1] (See Appendix B, p. 74 of Government's Brief and Appendix A, pp. 19, 20 of this Brief).

The Government in its Brief filed in the Court of Appeals abandoned its theory that the respondent was liable to the Administrator as subrogee of the bank's rights (p. 3, footnote 2). At page 4 of that Brief the Government said that considerations of State law:

> ". . . have point only respecting the relationship between the defendant and the bank in the first instance, or secondarily between the defendant and the bank's subrogee. We think it clear that state law control of this latter relationship can affect only those rights which the subrogee takes through the bank . . ."

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[1] The Administrator also issued a subsection (e) to this regulation upon which the Government bases its claim to indemnity from the respondent. This regulation is not authorized by the Act and will be considered in greater detail **infra**.

It is thus clear, by the Government's own admission, that the respondent can raise all available defenses against the United States in any suit involving the Administrator as subrogee, this being in strict accord with the express provisions of Section 506 of the Act, supra.

The existence of a complete defense by the respondent, as against the holder for any deficiency on the underlying debt because of the holder's failure to comply with the provisions of the Pennsylvania Deficiency Judgment Act, would seem to signal the end of the case inasmuch as the Administrator's rights as subrogee can rise no higher than the holder's. However the Government has advanced the theory that, notwithstanding the fact that Congress in the Act failed to create or recognize the right to proceed against the veteran other than by way of subrogation, there is, *without express provision in the Act*, an independent right of indemnity which the Administrator can validly enforce against the veteran to the extent of the guaranty paid to the holder. The Government contends that this right of indemnity is a federally-created right, unaffected by any considerations of State law. The Government bases its action in this case, in the absence of specific statutory provision in Title III of the Act, upon a regulation on "indemnity", purportedly issued under Section 504 of the Act, i.e., 36.4323(e), (Appendix B, p. 74 of Government's Brief).

B. *An independent obligation of the Veteran to indemnify the United States cannot be founded upon a Regulation not authorized by the Act, or upon the Common Law of Indemnity.*

The Government in the Second Count of its Complaint (R. 4, 5) bases its alleged right of indemnity from the respondent for the amount paid the holder on the guaranty

upon Section 506 of the Act, and regulation 36.4323(e), *supra*, which provides as follows:

> "Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran."

It is the Government's position that this regulation creates an independent right of indemnity, and further, that it was validly issued pursuant to Section 504 of the Act. As reference to Section 504 will show (Appendix A, p. 63 of Government's Brief) the Administrator is authorized to promulgate "such rules and regulations *not inconsistent with this title* . . . as are necessary and appropriate for carrying out the provisions of this title". (Emphasis supplied.) The Government points only to Section 506 as authority in the Act for the issuance of the above regulation. It is submitted that such an interpretation of Section 506 is unwarranted.

The Government in its Brief (p. 50) admits that the "Act as in force on the date of the loan *contained no express mention* of the veteran's indemnity obligations" (Emphasis supplied.) The Government then goes on to say that this absence of legislative authorization on the subject reflects "the assumption . . . that the consequences of a guaranty (in Section 506) were so well defined by the *common law* as to require no specification." (Emphasis supplied.)

The Government for the first time in these proceedings reveals that there is in fact no statutory basis for the alleged right of indemnity which it seeks to enforce against the respondent. Under these circumstances the related regulation 36.4323(e) *supra*, must be deemed to have been issued for the purpose of carrying out the express rights of the

Administrator as subrogee of the holder, after a default and payment on the guaranty has occurred, in accordance with the mandate of Section 506 of the Act, *supra*.

In this connection it should be noted that subsection (e) of 36.4323 is included with four other subsections (a-d) all of which deal solely with subrogation. The election of the Administrator to fashion a subject heading for this regulation, "Subrogation and indemnity" is self-serving and, at all events, provides no legal basis for the creation of an alleged independent right of indemnity.

It should be noted that Section 506 by its terms is mandatory, and not directory, in declaring that the Administrator, upon guaranty payment on default, "*shall* be subrogated to the rights of the holder". (Emphasis supplied.) This express direction on the part of Congress allows no latitude or warrant for any "assumption" that the silence of Congress was indication that the "consequences of a guaranty were so well defined by the common law as to require no specification."[2] (P. 50 of Government's Brief.)

It is significant that the only support which the Government can marshal for its contention that Congress recognized an independent right of indemnity in Section 506 are amendments to Section 500(a) in 1952, and the addition of a subsection (b) to Section 506 in 1956. (See p. 51 of Government's Brief.) We are here concerned with the terms of Section 506 on the date of the loan (1948) and not with subsequent amendments to the Act.

It can thus be seen that the Government is setting up and knocking down a "straw man" when it argues that there is

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[2] Where the intention of Congress is manifest from the face of the statute (Section 506: "the Administrator . . . shall be subrogated to the rights of the holder") there is no room for construction and the courts follow the literal rule of interpretation. **2 Sutherland on Statutory Construction,** Sections 4701, 4702 (Horack's 3d ed. 1943).

present in this case a Supremacy question under Article VI of the Federal Constitution (See pp. 49, 50 of Government's Brief). As indicated heretofore, Congress has created in the Administrator rights of subrogation only, a concomitant of which is that applicable State law will govern the rights of the Administrator as subrogee. This the Government concedes.

Even if it be conceded *arguendo* that Congress intended, as the Government urges (at p. 50 of its Brief), that the common law of indemnity was recognized by Congress in Section 506 of the Act, the Government would not be entitled to indemnification in this case for the reason that when it made payment upon the guaranty to the instant holder it was under no enforceable legal obligation to do so, and hence the Administrator was a volunteer. It is well settled that a principal owes no duty of indemnity in those cases where payment is made by his surety or guarantor upon claims for which the principal is not liable.

> ". . . If the principal has a defense . . . which may be asserted by the surety, a failure by the surety to assert such defense will make his payment voluntary and deprives him of the right to indemnity, provided he had knowledge of the defense . . ."
>
> Stearns, *Law of Suretyship* (5th ed.), Section 1141 at p. 522.

As will be discussed more fully *infra*, there was no payment made by the Administrator on account of the liability of the respondent for the reason that the holder failed to comply with the provisions of the Pennsylvania Deficiency Judgment Act. Hence the Administrator was a volunteer and, under the foregoing indemnity principles, the Administrator has no enforceable right of indemnity against the veteran respondent.

Note should be made of the fact that the Government, in advancing its argument that an independent right of indemnity exists, contends that such right came into existence when the respondent executed the HOME LOAN REPORT on February 6, 1948 (R. 13, 15, 16). This is based upon the fact that at the bottom of the first page thereof (R. 15) the respondent agreed to be bound by all regulations issued under the Act and in effect on the date of the loan. The Government cannot, however, pull itself up by its bootstraps. For the reasons hereinbefore set forth, there is no provision in Title III of the Act upon which a regulation creating an indemnity relationship could be based. Hence this contention of the Government is without merit.

II.

THE PENNSYLVANIA DEFICIENCY JUDGMENT ACT RELEASES DEBTORS AND GUARANTORS FROM FURTHER LIABILITY FOR ANY DEFICIENCY ON A MORTGAGE DEBT WHERE THE MORTGAGEE AFTER FORECLOSURE FAILS TO COMPLY WITH THE PROVISIONS OF THE ACT.

A. *The Court below properly referred to the Law of Pennsylvania for computation of the guaranty claim.*

Section 506 of the Act, 38 U. S. C. (1952 ed.) 694 g,[3] entitled "Procedure on default," authorizes payment of the guaranty by the Administrator to the holder upon default. It does not provide any method for determining how the

[3] See Appendix A, p. 64 of Brief of the United States.

amount of the guaranty to be paid shall be computed.[4] Section 506 refers merely to the guaranty.

In its Brief the Government lays great stress on the need for construing Section 506 to provide an absolute, 100% guaranty payment to the lender in each and every case of default, without regard to diminution of the Administration's *liability* on the guaranty under State law, such as the Pennsylvania Deficiency Judgment Act. The Court of Appeals rejected the contention of the Government that it can recover from the veteran whatever amount it paid to the holder of the guaranteed mortgage.

Assuming that an independent right of indemnity was authorized by Section 506, the regulation upon which the Government bases its right to indemnity provides:

> "(e) Any amounts paid by the Administrator *on account of the liabilities* of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran." (Emphasis supplied.)
>
> 38 C. F. R. (1949 ed.) 36.4323.

It is thus clear that by the Veterans' Administration's own regulations a debt of the veteran to the United States is created *only* when the Administrator makes a payment "on account of the liabilities of any veteran." The question then is whether a *liability* of the veteran existed when payment of the guaranty claim was made by the Administrator. Payment in this case having been made approximately two months *after* the foreclosure sale, was the veteran-mortgagor liable to the mortgagee for any deficiency on the underlying mortgage debt on the date of payment by the Administrator?

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[4] It does provide, of course, that payment shall not be in excess of the pro rata portion of the amount originally guaranteed.

The Court below correctly concluded that there was nothing in the Act or regulations which precluded reference to State law for determining the amount of the deficiency, if any, on the mortgage loan between mortgagor and mortgagee. In fact, the regulations make repeated references to the applicability of State law in carrying out the provisions and purposes of the Act.[5]

Regulation 36.4321 (Appendix B, p. 73 of Government's Brief) clearly indicates that reference to State law is required in this case. Sub-section (a) of this regulation provides in substance that the amount payable on a claim for the guaranty shall have:

> ". . . Deposits or other credits or setoffs legally applicable to the indebtedness on the date of computation (date of judgment or decree of foreclosure) . . . applied in reduction of the indebtedness on which the claim is based."[6]

The Court below reasoned that State law must of necessity be consulted in determining what credits or set-offs are legally applicable to the indebtedness between the mortgagor and the mortgagee on the date of foreclosure.

The Government now argues (p. 16 of its Brief) that the Court of Appeals erred in referring to State law because an existing V. A. regulation purports to govern the manner in which the credits against the claim for guaranty are computed.[7] The Government contends further (pp. 42, 43) that

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[5] See e.g., 38 C. F. R. (1949) ed.) 36.4319(a)(b)(d)(e)(f); .4320(a)(b)(d)(f)(h)(i)(j), .4321(a)-(d), .4323(a)(c)(d), .4324(a)(c)(f), .4325(b), .4327, and .4338.

[6] As noted by the Court below (R. 23, footnote 4) if any regulation be interpreted to deny the veteran the defense of partial or complete payment the regulation would be invalid as contrary to the Act.

[7] 38 C. F. R. (1949 ed.) 36.4320(a). See Appendix B, pp. 68-71 of Government's Brief.

the operation of this regulation (36.4320(a)) is in direct conflict with State law in this instance and, therefore, State law must yield under the Supremacy Clause.

The Court below was fully cognizant of regulation 36.4320(a), *supra*, as reference to the citation thereof in its opinion will show (R. 22). By clear implication the Court rejected its applicability to the case at bar, and properly so. The logical reason for this is the fact that 36.4320(a) is concerned with, and entitled, "Sale of security," while 36.4321, *supra*, involves "Computation of guaranty claims . . .", the key question in this case.

One final point remains before considering the merits of the Pennsylvania Deficiency Judgment Act. Reference to State law by Federal Courts in matters involving real estate is a well-settled practice and has been recognized by your Honorable Court on many occasions.

United States v. Brosnan, et al., 363 U. S. 237, 80 S. Ct. 1108, 4 L. Ed. 2d 1192 (1960);
Aquilino v. United States, 363 U. S. 509, 80 S. Ct. 1277, 4 L. Ed. 2d 1365 (1960);
United States v. Bess, 357 U. S. 51, 78 S. Ct. 1054, 2 L. Ed. 2d 1135 (1958).

In the *Brosnan* case, *supra*, this Court concluded that the adoption of State law was desirable, "except to the extent

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[8] Regulation 36.4320(a), **supra**, footnote 7, purports to create a procedure whereby the Administrator establishes an "upset price" which in theory is to be specified by the Administrator before the judicial sale on foreclosure occurs. It is apparent that this procedure **prior** to sale is completely unrealistic and incapable of practical application. Be that as it may, the "upset price" concept does **not** conflict with the concept of "fair market value" in the Pennsylvania Deficiency Judgment Act, **infra**. Even the Administrator has incorporated "fair market value" into the regulations. See 38 C. F. R. 36.4324(c), Appendix A of this Brief, p. 20.

that Congress may have entered the field."[9] This Court said further (363 U. S. at 241, 242):

> ". . . when Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law . . . The need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures . . ."[10]

This Court decided that it would be more consistent with Congressional intent:

> ". . . not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule." 362 U. S. at 242.

Under the foregoing authorities, the Court of Appeals was correct in referring to State law in the instant case.

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[9] As demonstrated under Part I of this Brief, **supra**, Congress had manifested no intention of entering the field in the context of this case.

[10] **Cf. Clearfield Trust Co. v. United States,** 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943), and cases cited at pp. 49, 50 of Government's Brief. See also Mishkin, **The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules For Decision,** 105 U. of Pa. L. Rev. 797, 828-832 (1957).

B. *Under the Pennsylvania Deficiency Judgment Act, the Respondent and the Administrator were released from all further liability by the failure of the holder to comply with the Act and the voluntary payment by the Administrator to the Holder was not on account of the liabilities of the Respondent Veteran.*

The Pennsylvania Deficiency Judgment Act (Appendix C, pp. 75-76 of Government's Brief; Appendix B, p. 21 of this Brief) provides that where the mortgagee purchases property at foreclosure, the fair market value of the property must be applied against the debt. This was recognized by the Pennsylvania Supreme Court in the case of *Sophia Wilkes Building and Loan Association v. Rudloff*, 348 Pa. 477, 35 A. 2d 278, 280, 281 (1944).

As the Court said in the *Wilkes* case, supra, at 280:

> "[T]he defendant is entitled to have the judgment against him satisfied of record, for it has been discharged as completely and effectually as if it had actually been paid off in cash."

The *Wilkes* case further emphasized the Act created a conclusive presumption that the property was worth at least one hundred per cent of the judgment.

Accord:

Union Trust Co. of New Castle v. Tutino, 353 Pa. 145, 44 A. 2d 556 (1945);
Pennsylvania Company, etc. v. Scott, 346 Pa. 13, 29 A. 2d 328 (1942).

The Pennsylvania Act also provides a method of determining fair market value. If the mortgagee considers the fair market value to be less than the debt he may have

appraisers appointed to have the amount fixed. In effect, the mortgagor is given a legal credit or set-off against the amount of indebtedness owing the mortgagee to the extent of the fair market value of the security which the mortgagee has obtained.[11] Thus, this squarely brings the present case within regulation 36.4321(a), *supra*.

On May 12, 1948, the respondent defaulted on his mortgage and on June 29, 1949, the mortgage was foreclosed at the sheriff's sale, the property being purchased by the mortgagee for $250.00. Thereafter, on July 8th, the mortgagee filed a claim for payment on its loan guaranty and on October 7th, the Administrator paid the full guaranty, to wit: $4,000.00.

Under the provisions of the Deficiency Judgment Act, the mortgagee had six months from the date of the sale (until December 29, 1949) to file a petition, and failing this the "debtor, obligor, guarantor and any other person liable directly or indirectly" to the mortgagee shall be released and discharged of such liability.[12]

By the express terms of the Act, both the respondent, as debtor, and the Administrator, as guarantor,[13] were fully released from further liability on the underlying mortgage debt when the mortgagee had failed to file the required petition on October 7, 1949, the date that the Administrator

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[11] As noted by the Court below (R. 24, footnote 6), if the property had been purchased by a third party at the sale, resulting in the receipt by the mortgagee of an amount of cash equal to or in excess of the amount of the debt, the Administrator could hardly claim that the veteran could not raise the defense of payment in full in an action brought against him on his indemnity contract.

[12] Section 7, 12 Pa. Stats. (Purdon) 2621.7 (Appendix C, p. 76 of Government's Brief).

[13] Compare **Security-First National Bank of Los Angeles v. Chapman**, 41 Cal. 2d 219, 106 P. 2d 431 (1940), where the California Deficiency Judgment Act was deemed **not** to apply to guarantors.

made payment. It is thus clear that the Administrator was on that date acting as a volunteer and under the indemnity principles set forth, *infra*,[14] the Administrator was not entitled to indemnity from the respondent.

The contentions of the Government regarding payment of the guaranty in this case leave always unanswered the central question: On what basis was the indebtedness of the respondent to the mortgagee computed so that the amount to be paid under the guaranty could be ascertained? As noted by the Court below (R. 26), until the mortgagee indicated that it was not satisfied that the fair market value of the property was equal to the indebtedness, there was no way of calculating any liability of the respondent and, in turn, any liability of the Government on its guaranty.

Failure of the lender in this case to proceed under the Pennsylvania Deficiency Judgment Act released both the veteran as debtor and the Veterans' Administration as guarantor.

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

EDWARD DAVIS,
Attorney for Respondent.

March, 1961.

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[14] Stearns, **op cit.** at p. 10 of this Brief.

APPENDIX A

VETERANS' ADMINISTRATION REGULATIONS

Veterans' Administration Regulations 36.4323(b),(c)(d), 38 C. F. R. (1949 ed.), 36.4323(b)(c)(d), provide as follows:

"*Subrogation and indemnity.*—

* * * * * * *

"(b) The holder, upon request, shall execute, acknowledge and deliver an appropriate instrument tendered him for that purpose, evidencing any payment received from the Administrator and the Administrator's resulting right of subrogation."

"(c) The Administrator shall cause the instrument required by paragraph (b) of this section to be filed for record in the office of the recorder of deeds, or other appropriate office of the proper county, town or State, in accordance with the applicable State law. The filing or failure to file such instrument for record shall have the legal results prescribed by the applicable law of the State where the real or personal property is situated, with respect to filing or failure to so file mortgages and other lien instruments and assignments thereof.

The references herein to 'filing for record' include 'registration' or any similar transaction, by whatever name designated when title to the encumbered property has been 'registered' pursuant to a Torrens or other similar title registration system provided by law."

"(d) As a condition to paying a claim for an insured loss the Administrator may require that the loan, including any security or judgment held therefor, be assigned to the extent of such payment, and if any claim has been filed in bankruptcy, insolvency, probate, or similar proceedings such claim may likewise be required to be so assigned."

Veterans' Administration Regulation 36.4324(c), 38 C. F. R. (1949 ed.), 36.4324(c) provides as follows:

"§36.4324 *Release of security.*

* * * * * * * *

"(c) Except upon full payment of the indebtedness or upon the prior approval of the Administrator, the holder shall not release a lien under paragraphs (a) or (b) of this section unless the consideration received for the release is commensurate with the fair market value of the property released and the entire consideration is applied to the indebtedness, or if encumbrance on other property is accepted in lieu of that released it shall be the holder's duty to acquire such lien on property of substantially equal value which is reasonably capable of serving the purpose for which the property released was utilized."

APPENDIX B.

PENNSYLVANIA DEFICIENCY JUDGMENT ACT

The Deficiency Judgment Act of July 16, 1941, 12 Pa. Stats. (Purdon), Sec. 2621.1, et seq., provides in part as follows:

"§2621.7a *Proceedings when petition not filed; marking judgment satisfied:*

If the plaintiff or plaintiffs shall fail to present such petition to fix the fair market value of the real property sold within six months after the sale of such real property as provided by this act, the debtor, obligor, guarantor or any other person liable directly or indirectly to the plaintiff or plaintiffs for the payment of the debt, or any person or persons interested in any real estate which would, except for the provisions of this act, be bound by said judgment, may present his or their petition to the court having jurisdiction, setting forth the fact of said sale, and that no petition has been filed within six months after said sale to fix the fair market value of the property sold, whereupon the court, upon proof of service of at least ten days' notice of said petition on the plaintiff or plaintiffs, or their attorney in said action, and being satisfied of such facts, shall direct the prothonotary to mark said judgment satisfied, released and discharged."

SUPREME COURT OF THE UNITED STATES

No. 392.—October Term, 1960.

United States, Petitioner, v. George E. Shimer.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 12, 1961.]

Mr. Justice Harlan delivered the opinion of the Court.

The United States brought this action in the Eastern District of Pennsylvania to recover from Shimer, on theories of subrogation and indemnity, an amount of $4,000 which the Veterans' Administration as guarantor of a loan made to him by Excelsior Saving Fund and Loan Association, had paid to that institution.

The relevant facts, as stipulated by the parties, are these: In 1948 Shimer, a World War II veteran, borrowed $13,000 from Excelsior secured by a mortgage upon residential realty which Shimer purchased with the proceeds. At Shimer's request the Veterans' Administration, pursuant to Title III of the Servicemen's Readjustment Act of 1944 as amended in 1945 [1] granted a maximum guarantee of the loan—that is, the lesser of $4,000 or 4/13 of the indebtedness outstanding at any particular time.[2] Both

[1] 58 Stat. 291, as amended by 59 Stat. 626.

[2] "Sec. 500. (a) Any person who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war . . . shall be eligible for the benefits of this title. Any loan made by such veteran within ten years after the termination of the war for any of the purposes, and in compliance with the provisions, specified in this title, is automatically guaranteed by the Government

the "Home Loan Report" signed by Shimer, and the Administration certificate of guaranty, specified that the rights of the parties would be governed by Regulations of the Administration in effect at the date of the loan and guaranty. Shimer defaulted in 1948, and in 1949 Excelsior, as mortgagee, notified the Veterans' Administration of his default and obtained a Pennsylvania judgment foreclosing the mortgage which then secured a debt in excess of $13,000.[3] After the property was purchased by Excelsior at a sheriff's sale for $250, the Veterans' Administration paid it the entire guaranty of $4,000 and brought the present action against Shimer.

In the Court of Appeals, the United States chose to rely exclusively on the Administration's alleged right of indemnity against Shimer, and accordingly does not press its claim here upon a theory of subrogation. The Court of Appeals held that the United States was not entitled to recover, reaching this result by applying a well-established principle of surety law which both parties agree was recognized by Congress when it passed Title III: The Veterans' Administration, as guarantor, could not recover from its principal, Shimer, any amount it was not obligated to pay the mortgagee, Excelsior, on his behalf.

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by this title in an amount not exceeding fifty per centum of the loan: *Provided*, That the aggregate amount guaranteed shall not exceed $4,000 in the case of real-estate loans. . . .

"(b) Loans guaranteed under this title shall be payable under such terms and conditions as may be agreed upon by the parties thereto, subject to the conditions and limitations of this title and the regulations issued pursuant to section 504: *Provided*, That the liability under the guaranty within the limitations of this title shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the obligation. . . ."

[3] The computation of the amount of the unpaid debt and the amount consequently owing on the guaranty will be open for further consideration by the District Court on the remand which will result from this opinion.

Turning to state law to determine the extent of the Administration's obligation to Excelsior, the court below considered that under Pennsylvania law both Shimer and the Veterans' Administration had been released from any further liability to Excelsior at the time the Administration paid its $4,000 guarantee, that is, after the foreclosure sale. Under the Pennsylvania Deficiency Judgment Act[4] a mortgagee who purchases the mortgaged property in execution proceedings cannot recover a deficiency judgment unless and until the mortgagee obtains a court determination of the fair market value of the mortgaged property and credits that amount to the unsatisfied liability. When, as eventuated in this case, the mortgagee fails to bring a proceeding for this purpose within six months after the foreclosure sale, the debtor and guarantor are permanently discharged.

We granted certiorari, 364 U. S. 889, to pass upon the contentions of the United States that: (1) the application of state law to determine the Administration's obligation to Excelsior is inconsistent with the Regulations proscribed by the agency charged with administering the Servicemen's Readjustment Act; (2) these Regulations are authorized by the federal enactment; and (3) a right of indemnity under federal law arises in favor of the Veterans' Administration upon proper payment of its obligations as guarantor.

I.

The Regulations promulgated by the Veterans' Administration make clear that they were intended to create a uniform system for determining the Administration's obligation as guarantor, which in its operation would displace state law. Section 36.4321, 12 Fed. Reg. 8344, in

[4] Purdon's Pa. Stats., Tit. 12, §§ 2621.1–2621.11.

subsection "a" [5] implements the "pro rata" requirements of § 500 (b) of the statute, Note 2, *supra*, and establishes the procedure for computing the amount of the guaranty which the mortgagee can, under § 506 of the statute, demand to have applied against his unpaid claim on the date of default.[6] In this instance it is agreed that such amount is $4,000. However we are informed by the Solicitor General that the mortgagee is both allowed and encouraged to delay collecting on the guaranty until after all events which may lead to a government offset have taken place. The Administration's potential right as subrogee to some portion of the proceeds of a foreclosure sale is such a possible offset. Accordingly, Excelsior waited until after the foreclosure sale to collect on the guaranty. This brought Excelsior within subsection "b" of § 36.4321 which provides that "credits accruing from the proceeds of a sale . . . of the security subsequent to the date of computation [pursuant to subsection "a," *supra*] and prior to the submission of the [guaranty] claim" shall be applied in reduction of the outstanding debt and "the amount payable on the claim shall in no event exceed the remaining balance of the indebtedness."

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[5] Section 36.4321 (a) provides in relevant part:

"*Computation of guaranty claims; subsequent accountings.* (a) Subject to the limitation that the total amount payable shall in no event exceed the amount originally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the date of claim but not later than (1) the date of judgment or of decree of foreclosure. . . ."

[6] Section 506 of the Act provides: "In the event of default in the payment of any loan guaranteed under this title, the holder of the obligation shall notify the Administrator who shall thereupon pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty. . . ."

It was at this point that the Court of Appeals applied the Pennsylvania Deficiency Judgment Act to determine "the credits accruing from the proceeds of . . . [the foreclosure] sale." However, the method of determining these credits is also specified in the Regulations, indeed spelled out in § 36.4320, 13 Fed. Reg. 7739–7741, in such great detail that there can be little doubt of an administrative intent that such method should provide the exclusive procedure.[7] In substance that section provides that in every case at least the amount realized at the foreclosure sale is to be credited. It also specifies the way in which the Veterans' Administration can require the mortgagee to credit more than the amount received at the foreclosure sale and thereby protect itself against the very risk the Pennsylvania Deficiency Judgment Act was designed to alleviate—the risk of having to make good its guaranty simply because the mortgaged property is sold for an inadequate price at a judicial sale. The Administrator is authorized to "specify in advance of such sale the minimum amount which shall be credited to the indebtedness of the borrower on account of the value of the security to be sold." The mortgagee must then reduce the balance of the unpaid debt by at least

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[7] Section 36.4320 (whose length and intricacy is such as to make impracticable its spreading in this opinion) was amended in particulars not here relevant and was generally clarified between the dates of the loan and guarantee and the dates of foreclosure and sale. We consider applicable the later wording in light of § 36.4300 of the Regulation which was in effect at the date of the loan and which provided:

"*Applicability.* The regulations in this part and amendments thereto shall be applicable to each loan entitled to an automatic guaranty, or otherwise guaranteed or insured, on or after the date of publication thereof in the FEDERAL REGISTER, and *shall be applicable to such loans previously guaranteed or insured to the extent that no legal rights vested thereunder are impaired.*" (Emphasis added.)

this minimum amount before collecting on the guaranty. The mortgagee has the option, however, of selling any property it purchased at or below this minimum amount to the Veterans' Administration for the specified minimum amount. If, as in the present case, the Administrator does not specify a minimum amount "the holder [mortgagee] shall credit against the indebtedness the net proceeds of the sale . . . ."

In effect, then, the scheme set up by the Regulations provides the Veterans' Administration with a measure of assurance that there shall be credited against the unpaid debt at least what the Administrator regards as the fair value of the mortgaged property. In terms of the present case: With an unpaid balance of indebtedness of $13,000, the Veterans' Administration should not have to pay its full guaranty of $4,000 unless the property which Excelsior may retain is worth less than $9,000. If Excelsior purchased property worth $10,000 for $250 at the foreclosure sale, the Administration should not have to pay more than $3,000 on its $4,000 guaranty, or, to state the matter more precisely, the Administration should realize a $1,000 credit as set off against its $4,000 guaranty which Excelsior could have claimed at the time of default. Accordingly, if the Administrator regarded the mortgaged property as worth $10,000 he could have specified (which he did not) a minimum credit (or "upset price") of that amount which Excelsior would then have had to credit against the $13,000 unpaid debt. If Excelsior had purchased the property for $10,000 or less, it would have had an option to reconvey the property at a valuation of $10,000 to the Veterans' Administration.

This scheme of protection, while intended to remedy the same abuses at which the Pennsylvania Deficiency Judgment Act is directed, is, of course, inconsistent with the Pennsylvania procedures which provide for a judicial

determination of the amount to be credited against an outstanding debt and do not obligate the guarantor to purchase the mortgaged property at its judicially determined value. We have no doubt that this regulatory scheme, complete as it is in every detail, was intended to provide the whole and exclusive source of protection of the interests of the Veterans' Administration as guarantor and was, to this extent, meant to displace inconsistent state law.[8]

II.

We think that the Servicemen's Readjustment Act authorized the Veterans' Administrator to displace state law by establishing these exclusive procedures.[9] In this regard it is important to recall the scope of our review in a case such as this. More than a half-century ago this

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[8] This conclusion is fortified by § 36.4320 (d) which specifically excludes and waives one type of state protection of guarantors and lenders which otherwise would have seemed to fit the other provisions of the section. Subdivision (d) provides:

"If a minimum bid is required under applicable State law, or decree of foreclosure or order of sale, or other lawful order or decree, the holder may bid an amount not exceeding such amount legally required. If an amount has been specified by the Administrator and the holder is the successful bidder for an amount not exceeding the amount legally required, such specified amount shall govern for the purposes of this section and for the purpose of computing the ultimate loss under the guaranty or insurance. In the event no amount is specified and the holder is the successful bidder for an amount not exceeding the amount legally required, the amount paid or payable by the Administrator under the guaranty shall not be subject to any adjustment by reason of such bid."

[9] Section 504 of the Act provides: "The Administrator is authorized to promulgate such rules and regulations not inconsistent with this title, as amended, as are necessary and appropriate for carrying out the provisions of this title, and may delegate to subordinate employees authority to issue certificates, or other evidence, of guaranty of loans guaranteed under the provisions of this title, and to exercise other administrative functions hereunder."

Court declared "that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involves questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of the opinion that his action was clearly wrong." *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108–109. This admonition has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, *e. g.*, *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111; *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793; *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194; *Labor Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344.

In the present case we need only consider the statutory authorization for § 36.4320 (a)(4) which provides that "If a minimum amount [the upset price] has not been specified by the Administrator . . . the holder shall credit against the indebtedness the net proceeds of the sale. . . ." It would, of course, have been possible for the Administrator to have promulgated regulations consistent with much of the present scheme which would have, in addition, accepted the benefits of local law which tended further to reduce a guarantor's risk of loss from sale of the mortgaged property at an inadequate price. Thus, with specific reference to the Pennsylvania Deficiency Judgment Act, there would have been nothing inherently illogical about administrative regulations providing for an "upset price" device and then adding that, in situations where the "upset price" technique was not

used by the Administrator, the Veterans' Administration was to be entitled to the benefits of the state judicial assessment of the value of property purchased by the mortgagee. However, the Veterans' Administrator has chosen not to take advantage of laws like that of Pennsylvania. If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

It is doubtless true that the policy of the Act is, broadly stated, to enable veterans to obtain loans and to obtain them with the least risk of loss upon foreclosure, to both veteran and the Veterans' Administration as guarantor of the veteran's indebtedness, and it is equally clear that had the Regulations adopted or included the provisions of the Pennsylvania Deficiency Judgment Act this would have furthered at least the second of these purposes. However, there are also ample indications both in the Act and in its legislative history that Congress intended the guaranty provisions to operate as the substantial equivalent of a down payment in the same amount by the veteran on the purchase price, in order to induce prospective mortgagee-creditors to provide 100% financing for a veteran's home.[10] The Regulations which the Administrator has adopted provide what the agency could allowably view as a more effective reconciliation of these two-fold ends than might be accomplished by a complete or partial adoption of the law of a State such as Pennsylvania.

[10] See, *e. g.*, H. R. Rep. No. 1418, 78th Cong., 2d Sess., pp. 3, 9; Hearings before Subcommittee of the Senate Committee on Finance on H. R. 3749, 79th Cong., 1st Sess., pp. 31–33 (General Omar Bradley).

The Regulations assure a Pennsylanvia mortgagee-creditor that he will be able either to recover the full amount of the guaranty or to sell the mortgaged property to the United States and recover the amount of its loss after such sale. For example, in the present situation Excelsior knew that it could either recover $4,000 from the Veterans' Administration and keep the mortgaged property, or that it could sell the mortgaged property to the United States, recovering on its guaranty the amount by which the unpaid debt exceeded the price which the United States had paid. The only risk of loss with which Excelsior would have been faced was the risk of having on its hands a property worth less than $9,000 to secure a residual debt of $9,000 (after the United States had paid $4,000 of the total debt of $13,000). This is precisely the risk which Excelsior would have had to assume had it insisted upon a $4,000 down payment by the veteran and lent $9,000 on the property. Presumably therefore it was willing to accept a $4,000 guarantee under the Administrator's Regulation in exchange for a $4,000 down payment.

In contrast, a mortagagee whose federal guaranty was subject to the law of a state such as Pennsylvania would be subjected both to an additional cost and to an additional risk, neither of which is present when there is an equivalent down payment. The additional cost is that required in every case to litigate the value of the mortgaged property. The additional risk is that, if it was judicially determined that the property was worth more than the amount for which the mortgagee could in fact sell it, the mortgagee would have to absorb the cost of the judicial error and could recover on its guaranty only the difference between the unpaid debt and the amount of the judicial estimate of the value of the property. Thus if the value of the mortgaged property in the present case had been judicially assessed at $10,000, Excelsior, after

payment of the resulting $3,000 on the guaranty, would have been left with the mortgaged property in place of an unrequited $10,000 loan, whereas had it insisted on a $4,000 down payment from the veteran it would have had the mortgaged property to stand for a $9,000 loan.[11]

We cannot say that a Pennsylvania lender would not prefer a down payment to a guaranteed loan in the same amount if the Pennsylvania Deficiency Judgment Act were applicable. Nor can we say that the Administrator has unreasonably sacrificed either the Government's or the veteran's protection in relying exclusively on the "upset price" device in order to preserve the interchangeability of a guaranty with a down payment. The Veterans' Administration can and does protect itself from a sale at an inadequate price by specifying the minimum credit which the mortgagee must subtract from the unpaid debt. In protecting itself it also places its own financial resources behind the debtor-veteran who may be forced to reimburse the Administrator only if the Administrator considers that the property has been sold at a fair price, and who retains all the benefits of state law as against the mortgagee.

We consider the Regulations to be a reasonable accommodation of the statutory ends; first, of making a federal guaranty the substantial equivalent of a down payment; and, second, of protecting both the Veterans' Administration and the veteran from unnecessary loss on a foreclosure sale. And since we find nothing in the statute or the legislative history antagonistic to this accommodation, we hold the Regulations to be a valid exercise of the authority granted the Administrator in § 504 of the Servicemen's Readjustment Act (Note 9, *supra*).

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[11] Pennsylvania law does not require a mortgagee who purchases the mortgaged property at a foreclosure sale for an amount less than the unpaid debt to return any portion of the down payment pursuant to a judicial assessment of the value of the property.

III.

Respondent's final contention is that even though the Veterans' Administration was obligated on its guaranty to Excelsior, the Administration nevertheless had no right to indemnity from him. It is argued, first, that under the Act the Administration, in circumstances like these, can recover over against the veteran only on a theory of subrogation to the mortgagee's rights. The Administrator having proceeded in this instance simply on a theory of indemnity, it is claimed that there is no statutory authorization for the present suit.

The Act, prior to its amendment in 1945, had no explicit provision controlling either the time of payment of the Administration's guaranty or its right to recover over against the veteran. It was assumed that the ordinary concomitants of a guaranty relationship would follow upon the mere authorization of government guaranteed loans and that these included the guarantor's right of indemnity. Restatement of the Law of Security § 104; Decisions of the Administrator of Veterans' Affairs, No. 625, Vol. 1, p. 1154. The 1945 amendments made explicit that payment of the guaranty would be due on the veteran's default and that thereupon the Administrator "shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty."

It is argued that this amendment, by negative implication, overruled or rejected what the Administrator had previously regarded as his independent right to indemnity, but surely this is carrying a negative implication too far. We cannot agree that Congress, without any statutory reference to the problem and without any discussion of it, intended to relieve the veteran of direct liability for amounts properly paid on his behalf by the Veterans' Administration. Not only might such a waiver of a

guarantor's normal rights require a more burdensome route to recovery over from the principal, but it would deprive the guarantor of any recovery on occasions when the mortgagee's rights were limited as against the debtor by state law, yet were protected against the Administrator by state or federal law. Relief from liability in these circumstances would convert a guaranty into a grant of aid. But the entire history of the "home loan" provisions of the statute is inconsistent with an intent to make outright grants, rather than loans of cash (S. 1767, 78th Cong.) or credit, to returning servicemen.

Moreover, the recognition of a loss to the guarantor merely because of a failure of the lender's rights against the principal is incompatible with the background of general surety law against which the statute was drawn. See, *e. g.*, *Leslie* v. *Compton*, 172 P. 1015. Indeed, at the time of the 1945 amendments to the Act the Administrator had already ruled that there was a right to recover over against the veteran on a theory of indemnity in situations where recovery by way of subrogation was barred by state law. Decisions of the Administrator of Veterans' Affairs, No. 625, Vol. 1, p. 1154.

For these reasons, we are constrained to agree with the uniform construction of the lower courts, including that of the two courts below, that the statute affords an independent right of indemnity to the Veterans' Administration. See *United States* v. *Shimer*, 276 F. 2d 792; *McKnight* v. *United States*, 259 F. 2d 540; *United States* v. *Jones*, 155 F. Supp. 52; *United States* v. *Gallardo*, 154 F. Supp. 373; *United States* v. *Henderson*, 121 F. Supp. 343.

Finally, we find untenable respondent's argument that the applicable Regulation does not support recovery because there was no debt due *from the veteran* at the time of payment on the guaranty. Section 36.4323 (e) 11 Fed. Reg. 2123, provides: "Any amounts paid by the Administrator on account of the liabilities of any veteran

guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran." The Regulation is merely declaratory of a surety's customary right of indemnity for amounts paid pursuant to an obligation of the guarantor assumed with the consent of the principal. Restatement of the Law of Security § 104. This right is in general unaffected by defenses of the principal which are not available to the guarantor.[12] Simpson, Suretyship, at p. 227; Stearns, Law of Suretyship, § 284. The Regulation certainly indicates no purpose to depart from the general rule in the case of guaranties by the Veterans' Administration.[13]

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would affirm the judgment for the reasons stated by the Court of Appeals, 276 F. 2d 792.

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[12] Moreover, at the time the Veterans' Administration became liable on its guaranty (*i. e.*, on the veteran's default and prior to the foreclosure sale, see Notes 5 and 6, *supra*) the Administration and the respondent veteran had no defenses to payment either under state law or under the Regulations of the Administrator.

[13] This is made particularly clear by the form of the Regulation which was the predecessor of 11 Fed. Reg. 2123. The earlier Regulation, 9 Fed. Reg. 12655, provided:

"(a) Any amounts paid to the creditor by the Administrator pursuant to the guaranty shall constitute a debt due to the United States by the veteran on whose application the guaranty was made. . . ."